

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

INSTITUTE FOR WILDLIFE PROTECTION,
et al.,

Plaintiff(s),

V.

GALE NORTON, et al.,

Defendant(s).

NO. C03-1251P

ORDER ON PLAINTIFFS' PETITION
FOR COSTS OF LITIGATION
INCLUDING ATTORNEY'S FEES

The above-entitled Court, having received and reviewed:

1. Plaintiffs' Petition for Costs of Litigation Including Attorneys Fees
2. Opposition to Plaintiffs' Petition for Attorneys' Fees and Costs
3. Reply re: Plaintiffs' Petition for Costs of Litigation Including Attorneys Fees

and all exhibits and declarations attached thereto, makes the following ruling:

IT IS HEREBY ORDERED that the motion is PARTIALLY GRANTED and PARTIALLY DENIED; while Plaintiffs' attorney hours are approved, as is their request to be reimbursed at the Seattle market rate, they are ordered to resubmit (within 10 days of the date of this order) their petition with those tasks which could be performed by a secretary or paralegal billed at the corresponding secretary or paralegal rate.

Background

On March 3, 2006, the Ninth Circuit Court of Appeals entered judgment in favor of Plaintiffs, who had petitioned for listing of the Western Sage Grouse under the Endangered Species Act (ESA). Although Plaintiffs contended that Defendants (collectively, the U.S. Fish and Wildlife Service, “FWS”) had illegally delayed making a decision and then improperly issued a negative 90-day finding

1 reflecting their conclusion that the Western sage grouse was not a valid subspecies, this Court ruled
 2 that Defendants were justified in their decision process and refused to remand the matter back to
 3 FWS. Plaintiffs appealed from that decision to the Ninth Circuit, and the Circuit's Mandate to this
 4 Court (reversing the original ruling and remanding to FWS) was docketed on May 1, 2006. Dkt. No.
 5 56. Plaintiffs are back before this Court to request attorneys fees and other costs of litigation which
 6 accrued in the action at this level.

7 **Discussion**

8 The ESA provides that a court may award costs of litigation including reasonable attorney fees
 9 for a final order "whenever the court determines such award is appropriate." 16 U.S.C. § 1540(g)(4).
 10 To qualify for attorney fees under the ESA, Plaintiffs must have "(1) achieved some success on the
 11 merits; and (2) contributed substantially to the goals of the [Act] in doing so." Western States
 12 Petroleum Assoc. v. EPA, 87 F.3d 280, 286 (9th Cir. 1996).

13 The government concedes that Plaintiffs have satisfied the "success" requirement, but argues
 14 that Plaintiffs did not "contribute substantially" to the goals of the ESA because their lawsuit did not
 15 "serve the public by assisting in the interpretation and implementation of the ESA." Carson-Truckee
 16 Water Conservancy Distr. v. Sec'y of the Interior, 748 F.2d 523, 525 (9th Cir. 1984). The
 17 government's supporting cases, however, are distinguishable (e.g., the "prevailing" party in Western
 18 States was a "a financially able... party having no more than its own economic interests at stake" 87
 19 F.3d at 286). Plaintiff's lawsuit in this instance represented just what the ESA was created to
 20 accomplish – a public interest organization seeking to restrain alleged governmental impropriety which
 21 negatively affects the ecology. This certainly satisfies the Carson-Truckee test of "assisting in the...
 22 implementation of the ESA." Plaintiffs are entitled to attorneys fees under the ESA.

23 The government next argues that Plaintiffs have resorted to block billing – basically, grouping
 24 items into "task" categories and listing the total hours for that task – a practice which they claim is
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1 “strictly forbidden.” Opp. to Petition, p. 6. Plaintiffs deny that what they have submitted is block
 2 billing (which the cases define as the lumping together of “discrete and unrelated” tasks; see, e.g.,
 3 Defenbaugh v. JBC & Assoc., 2004 WL 1874978, *9 (N.D. Cal. 2004)) and claim that the tasks are
 4 related and that the time entries reflect sufficient detail to allow the court to properly review the
 5 amount of time expended.

6 The Court agrees that the time entries in Plaintiffs’ billing are in fact grouped into related tasks,
 7 and cannot be properly characterized as “block billing.” However, the government makes a second
 8 point relative to Plaintiffs’ itemized billing which is valid – not all of the tasks require someone with
 9 the training and skill of an attorney and therefore should not be compensated at the attorney’s hourly
 10 rate. For example, pinpoint cite checking and Shepardizing can be done by a paralegal, and the cases
 11 make clear that, whether or not these tasks actually are performed by a paralegal, they should not be
 12 paid for at any greater than a paralegal rate. Davis v. City and County of San Francisco, 976 F.2d
 13 1536, 1543 (9th Cir. 1992) (*abrogated on other grounds*).

14 The government cites eight instances of tasks being billed out at the attorney rate which could
 15 be performed by secretaries (filing or e-mailing documents, searching for FedEx delivery address) or
 16 paralegals (pinpoint cite checking, Shepardizing). Opp. to Petition, pp. 7-8. The Court agrees that
 17 Plaintiffs’ counsel should be compensated at a reduced rate for those activities. Plaintiffs are directed
 18 to resubmit their bill with the rates for the above-noted activities adjusted to reflect the appropriate
 19 skill and compensation level.

20 The government points out that, while Plaintiffs and their attorney are located in Eugene,
 21 Oregon, the requested rates are based on the legal market in Seattle. The defense notes that the
 22 “reasonable hourly rate is typically determined according to the prevailing market rate in the relevant
 23 legal community” (Blum v. Stenson, 465 U.S. 886, 895 (1984)), then goes on to cite a D.C. Circuit
 24 Court opinion for the proposition that the billing rates should be calculated based upon where the
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1 work was performed. Davis v. County Solid Waste Mgmt. Distr. v. EPA, 169 F.3d 755, 759-60
2 (D.C.Cir. 1999).

3 However, the law in the Ninth Circuit is clear: the appropriate market to set the attorney's
4 rates is the "forum district" (Mendenhall v. NTSB, 213 F.3d 464, 471 (9th Cir. 2000)) or more
5 specifically, the forum rates "where the district court sits." Davis v. Mason County, 927 F.2d 1473,
6 1488 (9th Cir. 1991). Seattle is the correct market to use in setting the rates for Plaintiffs' attorney.

7 **Conclusion**

8 Plaintiffs are entitled under the ESA to an award of the costs of litigation at the district court
9 level, including attorneys fees. Their attorney fees may be reimbursed at the Seattle market rate for
10 similar work, but they are ordered to submit a revised billing statement which bills out the clerical and
11 paralegal tasks associated with their lawsuit at a more appropriate rate. That revised bill shall be
12 submitted within 10 days of the date of this order.

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14 The clerk is directed to provide copies of this order to all counsel of record.

15 Dated: July 10, 2006

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20 Marsha J. Pechman
21 U.S. District Judge
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